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No. 00-1072

IN THE

Supreme Court of the United States

LEONARD EDELMAN,
Petitioner,

v.

LYNCHBURG COLLEGE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae*.[1] The written consent of all parties has been filed with the Clerk of this Court. The brief urges affirmance of the decision below and thus supports the position of Respondent Lynchburg College before this Court.

[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community and includes over 360 of the nation's largest private sector corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to proper interpretation and application of equal employment laws and regulations. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's member companies are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), *as amended*, 42 U.S.C. § 2000e *et seq*., as well as other federal employment nondiscrimination laws enforced by the U.S. Equal Employment Opportunity Commission (EEOC). As employers, and as potential respondents to charges of discrimination under Title VII, EEAC's members have a direct and ongoing interest in the issue presented in this appeal concerning the validity of the EEOC's "relation-back" regulation, 29 C.F.R. § 1601.12(b), which purports to allow an untimely charge of discrimination to "relate-back" to a timely, yet unverified, written submission. The court below properly ruled that the EEOC's relation-back regulation circumvents Title VII's plain and unambiguous charge filing requirements and therefore is invalid as a matter of law.

Because of its interest in the application of the nation's fair employment laws, EEAC has filed over 470 briefs as *amicus curiae* in cases before the Supreme Court, the United States Courts of Appeals, and various state supreme courts. As part of this *amicus* activity, EEAC has filed briefs in

Mohasco Corp. v. Silver, 447 U.S. 807 (1980), and other cases concerning application of Title VII's charge filing requirements.

Thus, EEAC has an ongoing interest in, and a familiarity with, the legal and public policy issues presented to the Court in this case. Because of its significant experience in these matters, EEAC is well situated to brief this Court on the ramifications of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Petitioner Leonard Edelman, a biology professor for Respondent Lynchburg College, was denied tenure on June 6, 1997. *Edelman v. Lynchburg College*, 228 F.3d 503, 505 (4th Cir. 2000). Subsequently, on November 14, 1997, he submitted an unverified correspondence to the EEOC, alleging that the College discriminated against him on the basis of his gender, national origin and religion.[2] *Id.* His letter concluded with the statement, "I hereby file a charge of employment discrimination against Lynchburg College . . . and I call upon the EEOC to investigate this case." *Id.* at 505-06. Edelman's letter was received by the EEOC on November 18, 1997. 228 F.3d at 506.

On November 26, 1997, Edelman, through his attorney, sent a second correspondence to the EEOC requesting a "personal interview with an EEOC investigator prior to the final charging documents being served on the college." *Id.* The letter further indicated that Edelman understood any "delay occasioned by the interview" would not affect the November 14, 1997 "filing date." *Id.*

The EEOC responded by sending Edelman correspondence indicating its need for "additional information in order to investigate his case." *Id.* The letter also urged Edelman to

[2] Edelman is a white Jewish man of Polish national origin.

schedule "an interview 'as soon as possible because a charge of discrimination must be filed within the time limits imposed by law'." *Id.* The EEOC interviewed Edelman on March 3, 1998, and on March 18, the agency mailed him a draft charge for his verified signature. Edelman did not return a verified charge until April 15, 1998, 313 days after the alleged discrimination occurred. *Id.*

Notwithstanding the filing defects, the EEOC served Lynchburg College with notice of the charge and commenced an investigation thereof, at the conclusion of which it issued Edelman a "right-to-sue" notice. *Id.* Edelman then filed an action in Virginia state court alleging, among other things, a cause of action under Title VII. *Id.* Lynchburg College removed the action to federal district court and moved to dismiss on jurisdictional grounds, claiming that Edelman's failure to timely file a charge of discrimination with the EEOC deprived the court of subject matter jurisdiction over the Title VII claim. *Id.* The district court granted the College's motion, and remanded Edelman's remaining claims to Virginia state court. *Edelman v. Lynchburg College*, 66 F. Supp.2d 777, 781-82 (W.D. Va. 1999).

Edelman appealed the dismissal of his Title VII action to the U.S. Court of Appeals for the Fourth Circuit, arguing that under the EEOC's relation-back regulation, his April 15, 1998 charge "related-back" to the November 14, 1997 unverified submission and, as such, was timely filed in accordance with Title VII's charge filing requirements. *Edelman*, 228 F.3d at 507. The Fourth Circuit ruled that Edelman's charge was not filed within the timeframes prescribed by Title VII. *Id.* at 509. It held further that the EEOC's relation-back regulation is contrary to the plain language of the Act and therefore is not entitled to judicial deference. *Id.* at 508-09. On January 2, 2001, Edelman filed a petition for writ of certiorari, which this Court granted on the limited issue of the validity of the EEOC's relation-back regulation. 121 S. Ct. 2547 (2001).

SUMMARY OF ARGUMENT

Title VII expressly provides that a charge "shall be in writing *under oath or affirmation* and shall contain such information and be in such form as the Commission requires." 42 U.S.C. § 2000e-5(b) (emphasis added). Furthermore, Title VII clearly and unambiguously prescribes the timeframe within which a charge of discrimination must be submitted to the agency for investigation. 42 U.S.C. § 2000e-5(e)(1). Despite this unequivocal statutory language, the EEOC's procedural regulations permit an untimely charge of discrimination to "relate-back" to a timely filed, but unverified submission. 29 C.F.R. § 1601.12(b).

Because Congress has spoken directly on the issue of timely filing of verified charges, and the EEOC's relation-back regulation conflicts with the plain language of the Act and is unreasonable, it is not entitled to judicial deference under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Nor is the EEOC's relation-back doctrine entitled to "persuasive" judicial deference under *Skidmore v. Swift*, 323 U.S. 134 (1944), since it conflicts with other provisions contained in the same procedural scheme, is inconsistent with the EEOC's own charge filing enforcement guidance, and clashes with regulatory guidance issued by the agency contemporaneously with the passage of Title VII. 29 C.F.R. §§ 1601.9, 1601.12(b); EEOC Compl. Man. § 2-IV(A), Charge Filing (May 12, 2000) [3]; 30 Fed. Reg. 8407 (July 1, 1965) (codified at 29 C.F.R. § 1601.5).

The EEOC ordinarily will not, and is not required to, serve notice of an unverified submission on an employer implicated in the complaint. 42 U.S.C. § 2000e-5; Brief for the United States and the Equal Employment Opportunity Commission as *Amici Curiae* on Petition for a Writ of Certiorari, at 16-17. Since the relation-back regulation contains no time limit for

[3] *http://www.eeoc.gov/docs/threshold.html#2-IV-A*

after-the-fact verification, an individual could wait forever and a day to perfect his or her submission and therefore permit it to be served on the named respondent. In fact, the EEOC has waited years to serve respondents with discrimination complaints that were not submitted in accordance with Title VII's charge filing requirements. *E.g.*, *Danley v. Book-of-the-Month Club, Inc.*, 921 F. Supp. 1352 (M.D. Pa. 1996), *aff'd mem.*, 107 F.3d 861 (3d Cir. 1997); *Balazs v. Liebenthal*, 32 F.3d 151 (4th Cir. 1994); *Vason v. City of Montgomery*, 240 F.3d 905 (11th Cir. 2001).

Providing notice of alleged discriminatory acts long after the fact deprives a respondent-employer of the opportunity to conduct a prompt internal investigation of the allegations. It also requires respondents to defend themselves against claims based on incidents that could have occurred years earlier, for which they no longer possess pertinent employment records. Thus, the EEOC's relation-back regulation impedes effective self-monitoring of employment practices and thereby undermines Title VII's well-recognized goals of preventing and correcting workplace discrimination. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 764 (1998).

ARGUMENT

I. THE EEOC'S RELATION-BACK REGULATION, WHICH PURPORTS TO ALLOW AN UNVERIFIED SUBMISSION TO STAND IN THE PLACE OF A VERIFIED, TIMELY CHARGE, REPRESENTS AN IMPERMISSIBLE EXERCISE OF ADMINISTRATIVE AUTHORITY AND THEREFORE IS NOT ENTITLED TO JUDICIAL DEFERENCE

The U.S. Equal Employment Opportunity Commission (EEOC) is authorized by Congress to enforce Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.*, which prohibits discrimination against a covered individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). "Title VII sets forth 'an integrated, multistep enforcement procedure' that . . . begins with the filing of a charge with the EEOC alleging that a given employer has engaged in an unlawful employment practice." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977) (footnote omitted)).

Title VII expressly provides that a charge "shall be in writing *under oath or affirmation* and shall contain such information and be in such form as the Commission requires." 42 U.S.C. § 2000e-5(b) (emphasis added). The EEOC is permitted to investigate alleged employment discrimination under Title VII only upon receipt of a legally sufficient discrimination "charge." 42 U.S.C. § 2000e-5. As this Court has noted, "[t]he Commission's enforcement responsibilities are triggered by the filing of a specific *sworn* charge of discrimination." *University of Pa. v. EEOC*, 493 U.S. 182, 190 (1990) (emphasis added).

Furthermore, Title VII clearly and unambiguously prescribes the timeframe within which a charge of discrimination must be submitted to the agency for investigation:

> A charge under this section *shall* be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice . . . such charge *shall* be filed . . . within three hundred days after the alleged unlawful employment practice occurred . . .

42 U.S.C. § 2000e-5(e)(1) (emphasis added).

Section 1601.12(b) of the EEOC's procedural regulations purports to allow an otherwise untimely filed discrimination charge to be rendered timely by virtue of its "relation-back" to an earlier, timely submission:

> [A] charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of. A charge *may* be amended to cure technical defects or omissions, *including failure to verify the charge*, or to clarify and amplify allegations made therein . . . .

29 C.F.R. § 1601.12(b) (emphasis added). Under the regulation, *any* "written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of," whether verified or not, is elevated to the status of, and for enforcement purposes is indistinguishable from, a charge that complies fully with Title VII's charge filing requirements. *Id.* For the reasons set forth more fully below, the EEOC's relation-back regulation represents an impermissible exercise of administrative authority, is not entitled to judicial deference, and therefore should be invalidated.

A. The EEOC's Relation-Back Regulation Does Not Qualify for Judicial Deference Under the *Chevron* Doctrine

In *Chevron U.S.A. v. Natural Resources Defense Council*, this Court set forth a two-part standard to be applied by courts in assessing the validity of an administrative statutory interpretation:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. 837, 842-43 (1984) (footnotes omitted). Assuming, *arguendo*, that the *Chevron* doctrine applies to procedural regulations such as the one at issue in this case [4], the EEOC's

[4] "The relation-back provision of § 1601.12(b) is undeniably procedural in nature," Brief of Petitioner, at 7, is not subject to formal notice-and-comment rulemaking, *see, e.g.*, 42 Fed. Reg. 42022 (Aug. 19, 1977), and does not carry the force of law. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 258 (1991). Therefore, *Chevron* deference arguably does not apply. *United States v. Mead Corp.*, 121 S. Ct. 2164, 2172 (2001) ("We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed."); *see also Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.")

The fact that the EEOC over the years has issued public notices of proposed changes to its procedural regulations and has solicited public comment thereupon does not alter the non-substantive nature of the regulations. 42 Fed. Reg. 42022 (Aug. 19, 1977); 45 Fed. Reg. 48614 (July 21, 1980); 46 Fed. Reg. 9970 (Jan. 30, 1981); 46 Fed. Reg. 37523 (July 21, 1981); 52 Fed. Reg. 11503 (Apr. 9, 1987). Not only has the agency resorted to such procedures inconsistently, when it *has* sought public comment to proposed revisions to the regulations, its notices have included unequivocal disclaimers that emphasize the agency's exemption from formal notice-and-comment rulemaking requirements. 42 Fed. Reg. 42022 (Aug. 19, 1977).

relation-back rule nonetheless fails to qualify for judicial deference under either prong of that test.

1. The Relation-Back Regulation Conflicts With the Plain Language of the Act

Under the first part of the *Chevron* standard, if Congress has "spoken to the precise question at issue," the agency may not attempt to impose its own interpretation of the matter, and "must give effect to the unambiguously expressed intent of Congress." *Id.* In *Connecticut National Bank v. Germain*, 503 U.S. 249 (1992), this Court noted:

> [I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'

503 U.S. at 253-54 (citations omitted).

Title VII expressly declares that a charge—which under the Act must be in writing and under oath or affirmation—*shall* be filed with the EEOC within 180 or 300 days of the alleged discriminatory act. 42 U.S.C. § 2000e-5(e)(1). In establishing strict filing deadlines under Title VII, Congress "clearly intended to encourage prompt processing of all charges of employment discrimination" and chose not to legislate any exceptions to the general rule. *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980). Thus, courts "must respect the compromise embodied in the words chosen by Congress" and may not "alter the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction." *Id.*

Section 1601.12(b) of the EEOC's procedural regulations purports to allow an otherwise untimely filed discrimination charge to be rendered timely by virtue of its "relation-back"

to an earlier, timely submission that need not be sworn. 29 C.F.R. § 1601.12(b). Under the regulation, *any* "written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of," whether verified or not, is elevated to the status of, and for enforcement purposes is indistinguishable from, a charge that complies fully with Title VII's charge filing requirements. *Id.* In fact, the regulation inexplicably places unverified submissions on a higher footing than verified charges that are timely filed, since it *permits*, but does not *require*, after-the-fact verification, an option clearly at odds with Title VII's plain language. *Id.*; 42 U.S.C. § 2000e-5(b).

"Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language." *Public Employees Ret. Sys. v. Betts*, 492 U.S. 158, 171 (1989). Since the EEOC's relation-back regulation clearly conflicts with Title VII's plain language, it must be invalidated.

2. The EEOC's Interpretation of Title VII's Charge Filing Requirements Does Not Represent a Reasonable Construction of the Act and Therefore Is Not Entitled to Deference by This Court

Title VII's charge filing requirements are unambiguous. Even if they were not, the EEOC's relation-back regulation nonetheless would fail to qualify for *Chevron* deference because it is unreasonable. If a statute "is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843 (footnote omitted). If the agency's interpretation is unreasonable, then it must be invalidated.

Among other things, the EEOC's relation-back regulation effectively nullifies Title VII's filing deadlines by allowing an untimely charge to be rendered timely based on its

relationship to any earlier, unverified written submission. Under the rule, a charging party is under no obligation *ever* to verify his or her written complaint of discrimination as required by Title VII. Moreover, the regulation sets down no timeframe within which this after-the-fact verification is to occur. Thus, filing of a verified charge could occur several months, or even years, after receipt of the unsworn submission and expiration of the statutory filing deadline.

A statutory limitations period is "a clearly legal issue that courts are better equipped to handle." *Bamidele v. INS*, 99 F.3d 557, 561 (3d Cir. 1996) (citations omitted). The EEOC's relation-back regulation, which in effect regulates Title VII's charge filing deadlines out of existence, is well outside of the agency's administrative authority and therefore represents a patently unreasonable construction of the Act.

B. The EEOC's Relation-Back Regulation Is Not Entitled to *Skidmore* Deference

In *Skidmore v. Swift*, 323 U.S. 134 (1944), this Court ruled that an agency's interpretations of a statute it is authorized to administer, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." 323 U.S. at 140. In determining what level of deference is to be accorded administrative interpretations of statutory law, courts applying *Skidmore* have considered "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 258 (1991) (citations and internal quotations omitted). Such an approach "has produced a spectrum of judicial responses, from great respect at one end . . . to near indifference at the other." *United States v. Mead Corp.*, 121 S. Ct. 2164, 2172 (2001) (citations omitted).

Applying the *Skidmore* factors to the EEOC's relation-back regulation, it is clear that the regulation lacks any persuasive authority and therefore is not entitled to judicial deference, however slight, from this Court.

1. The EEOC's Relation-Back Doctrine Conflicts With the Agency's Other Title VII Regulatory Provisions

Section 1601.9 of the EEOC's procedural regulations requires that "a charge *shall* be in writing and signed and shall be verified," while Section 1601.12(b) of the same regulatory scheme provides that "a charge *may* be amended to cure technical defects or omissions, *including failure to verify the charge*." 29 C.F.R. §§ 1601.9, 1601.12(b) (emphasis added). Reading the regulations as a whole, they *require*, on the one hand, that a charge be signed and verified. On the other hand, the regulations merely *permit*, but do not mandate, after-the-fact perfection of an unverified submission, where the subsequent, verified charge on which the submission presumably was based is not timely filed. Thus, an unverified submission is permitted under Section 1601.12(b) to stand as a charge, even if no effort ever is made to satisfy the verification requirements contained in Section 1601.9 of the regulations. *Id.*

Because the EEOC's regulation directly conflicts with other provisions within the same body of regulations, it lacks even the slightest "power to persuade" and therefore is not entitled to *Skidmore* deference.

2. The Relation-Back Rule Is Inconsistent With Regulatory Guidance Issued Contemporaneously With Passage of the Act

The EEOC's original Title VII procedural regulations, first promulgated on July 1, 1965, provided:

> The Commission will receive information concerning alleged violations of this title from any person. Where the information discloses that a person is entitled to file a charge with the Commission, the appropriate office will render him assistance in the filing of a charge.

30 Fed. Reg. 8407, 8408 (July 1, 1965) (codified at 29 C.F.R. § 1601.5). Section 1601.5 of the 1965 regulations clearly distinguished between a "charge" and other "information" the EEOC may receive regarding alleged discrimination, which may be used to assist in the filing of a charge, but which does not, of itself, constitute a valid charging document. 29 C.F.R. § 1601.5 (1965). The regulations also provided that a "charge," as distinguished from other information received by the agency, "shall be in writing and signed, and shall be sworn to . . . ." 29 C.F.R. § 1601.8 (1965).

Significantly, the 1965 regulations did not contain, and made no reference to, the relation-back provision at issue in this case.[5] 29 C.F.R. § 1601.11(a)-(e) (1965). It was not

[5] The 1965 provision most analogous to the one at issue in the instant case provided, in whole:

> § 1601.11 Contents.
>
> Each charge should contain the following:
>
> The full name and address of the person making the charge;
>
> The full name and address of the person against whom the charge is made (hereinafter referred to as the respondent);
>
> A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practice;
>
> If known, the approximate number of employees of the respondent employer or the approximate number of members of the respondent labor organization, as the case may be;
>
> A statement disclosing whether the proceedings involving the alleged unlawful employment practice have been commenced before a State or local authority charged with the enforcement of fair employment practice laws, and, if so, the date of such commencement and the name of the authority.

29 C.F.R. § 1601.11(a)-(e) (1965).

until the following year, on July 29, 1966, that the agency amended the regulations to include the new rule. 31 Fed. Reg. 10269 (July 29, 1966) (codified at 29 C.F.R. § 1601.11(b)).

When the EEOC first promulgated the procedural regulations in 1965, it clearly understood that only written, sworn submissions are entitled under Title VII's plain language to be considered "charges." The agency's subsequent adoption of the relation-back "policy," which in effect negates Title VII's verification requirement, represents an inexplicable change in position that deserves not even the slightest level of judicial deference from this Court.

3. The EEOC's Relation-Back Doctrine Conflicts With the Agency's Own Policy Guidance on Title VII Charge Filing

In Section 2 of its new Compliance Manual on "Threshold Issues,"[6] the EEOC acknowledges that timely filing of a charge is a jurisdictional prerequisite to investigation, barring only extraordinary equitable considerations. It provides:

> Ordinarily, a charge must be filed within the statutory limitations period. The filing deadline can occasionally be extended when equitable considerations demand or when the parties agree to waive the deadline. . . . Under Title VII . . . a charging party must file a charge with the EEOC within either 180 or 300 days of the alleged unlawful employment practice, depending upon whether the alleged violations occurred in a jurisdiction that has a state or local fair employment practices agency (FEPA)

[6] *http://www.eeoc.gov/docs/threshold.html*

> with the authority to grant or seek relief. . . . Because most jurisdictions have FEPAs, the limitations period will usually be 300 days.

EEOC Compl. Man. § 2-IV, Timeliness (May 12, 2000) (footnotes omitted). It provides further:

> When a charge is filed with the Commission, the assigned investigator ordinarily will determine whether certain threshold requirements are satisfied *before* considering the merits of the discrimination claims . . . If a charge does not satisfy threshold requirements, it should be dismissed.

EEOC Compl. Man. § 2-I, Overview (May 12, 2000) (footnotes omitted).

In its new enforcement guidance, the EEOC concedes that in the absence of extraordinary equitable considerations or express waiver by the parties of applicable filing deadlines, the 180/300-day statutory timeframe for filing a Title VII charge of discrimination may not be tolled or extended. EEOC Compl. Man. § 2-IV(D), Extending the Timeframe for Filing (May 12, 2000). As the agency notes, the doctrine of equitable tolling may be applied where a charging party's "excusable lack of knowledge about the EEO process or the alleged violation" caused the filing delay. *Id.*

Similarly, equitable estoppel may be used to excuse an untimely filing attributable to an employer's misconduct, on which the charging party relied to his or her detriment in failing to timely file a discrimination charge. *Id.* Finally, as the EEOC's guidance instructs, the 180/300-day charge filing limitations period may be waived, by mutual agreement, in order to facilitate private settlement negotiations. *Id.*

Significantly, nowhere in the guidance does the EEOC suggest, as its procedural regulations purport to provide, that a charge filing deadline may be extended to allow a charging party the convenience of verifying, and therefore "perfecting," a defective submission, regardless of the reason for the delay. Moreover, unlike the EEOC's regulations, none of the equitable principles under which a charge filing deadline may be extended alter the fundamental character of a charge, which Congress plainly and expressly declared must be submitted in writing *and* under oath or affirmation.

Nor do those principles relieve a charging party of his or her responsibility to file a charge within the applicable time limitations period. Rather, they provide an opportunity for a reviewing court—not the EEOC itself—to excuse a party's noncompliance based on equitable considerations, which this Court expressly has ruled are equally applicable to Title VII discrimination charges as they are to other legal actions. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982).

Because the EEOC's relation-back regulation cannot be reconciled either with its enforcement guidance and policy regarding threshold Title VII charge filing requirements or other provisions contained in the same regulatory scheme, it is not entitled to any judicial deference under *Skidmore*.

II. ALLOWING THE EEOC TO CIRCUMVENT TITLE VII'S 300-DAY VERIFIED CHARGE FILING REQUIREMENT WOULD LIMIT EMPLOYERS' ABILITY TO TIMELY ADDRESS, AND THEREFORE UNDERMINE TITLE VII'S PRIMARY GOAL OF ERADICATING, EMPLOYMENT DISCRIMINATION

Title VII expressly requires the EEOC to serve an employer with notice of a charge of discrimination within ten days of its filing date. 42 U.S.C. § 2000e-5(e)(1). The statutory notice provision exists for good reason. "[T]he principal objective of the provision seems to have been to provide employers fair notice that accusations of discrimination have been leveled against them and that they can soon expect an investigation by the EEOC." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 74 (1984).

The EEOC ordinarily will not serve prospective respondents with intake questionnaires or other preliminary documents that have not been verified. Brief for the United States and the Equal Employment Opportunity Commission as *Amici Curiae* on Petition for a Writ of Certiorari, at 16-17. Under the relation-back rule, verification of such submissions—which the agency then will treat as "charges"—is permitted to occur outside of the statutory 180/300 day filing limitations period. Since the regulation does not place time limits on after-the-fact verification, a non-compliant charging party could wait months, or years, to perfect an unverified submission. "Carried to its logical conclusion, under the EEOC's interpretation of its regulation, it would *never* be too late to verify a charge . . ." *Balazs v. Liebenthal*, 32 F.3d 151, 157 (4th Cir. 1994) (emphasis added).

In fact, the EEOC has investigated and even issued right to sue notices on discrimination complaints that *never* were verified. *Danley v. Book-of-the-Month Club, Inc.*, 921 F. Supp. 1352 (M.D. Pa. 1996), *aff'd mem.*, 107 F.3d 861 (3d Cir. 1997); *Balazs v. Liebenthal*, 32 F.3d 151 (4th Cir. 1994); *Vason v. City of Montgomery*, 240 F.3d 905 (11th Cir. 2001). In *Danley v. Book-of-the-Month Club, Inc.*, for instance, the plaintiff submitted an unverified correspondence to the EEOC "indicating that she sought to lodge a formal complaint against BOMC and requesting that her charge be filed with the Pennsylvania Human Relations Commission." 921 F. Supp. at 1353. The EEOC did not provide the respondent with notice of the discrimination complaint for over two years, until the day that it issued the plaintiff a right-to-sue letter. *Id.*

Delaying notice of alleged discriminatory acts until well after the fact deprives a respondent-employer of the opportunity to detect and correct potentially discriminatory employment practices in a timely and efficient manner, and thus undercuts Title VII's primary goal of preventing

unlawful discrimination. "Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms [which] would effect Congress' intention to promote conciliation rather than litigation in the Title VII context, and the EEOC's policy of encouraging the development of grievance procedures." *Burlington Indus. v. Ellerth*, 524 U.S. 742, 764 (1998) (citations omitted). The EEOC's relation-back regulation undermines the Act's strong "deterrent purpose" by impeding early detection and resolution by respondents of potentially discriminatory employment practices. *Id.*

Absent timely notice, respondents also must defend themselves against claims based on incidents that could have occurred years earlier, for which they no longer possess pertinent employment records. Many corporate record retention policies, for instance, permit the destruction of routine personnel forms and employment documents after a set period of time. Even under the EEOC's own record retention regulations, an employer, unaware of the existence of a discrimination claim, may purge information that it ultimately may need to defend against the unknown claim. 29 C.F.R. § 1602.14. The EEOC's regulations provide, in relevant part:

> Any personnel or employment record made or kept by an employer (including but not necessarily limited to requests for reasonable accommodation, application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship) shall be preserved by the employer for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later. . . . Where a charge of discrimination has been filed, or an action brought by the Commission or the Attorney

> General, against an employer under title [sic] VII or the ADA, the respondent employer shall preserve all personnel records relevant to the charge or action until final disposition of the charge or the action.

29 C.F.R. § 1602.14. Thus, even the EEOC's own regulations permit a respondent who otherwise has no knowledge that a charge has been filed against it to destroy relevant employment records after only a year.

Were the EEOC's relation-back regulation permitted to stand, employers would be faced with the unenviable choice of destroying employment records, in accordance with the EEOC's record retention regulations and in the absence of knowledge of a discrimination charge, or retaining, *indefinitely*, literally thousands and thousands of pieces of paper in the event a charge *ever* is filed.

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed in its entirety.

Respectfully submitted,

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